JUN 1 1 2003

No. 02-6683

In the Supreme Court of the United States

HERNAN O'RYAN CASTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the court of appeals' decision affirming the dismissal of a motion for collateral relief under 28 U.S.C. 2255 as second or successive.

2. Whether, after petitioner's initial post-conviction motion was recharacterized as a motion under 28 U.S.C. 2255, the district court correctly dismissed petitioner's subsequent Section 2255 motion as second or successive.

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OPINION BELOW

The opinion of the court of appeals (J.A. 198-208) is reported at 290 F.3d 1270.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2002. The petition for a writ of certiorari was filed on October 1, 2002, and granted on January 27, 2003. In addition to the question presented by the petition, the Court ordered the parties to address whether it has jurisdiction to review the court of appeals' decision. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), but is lacking under 28 U.S.C. 2244(b)(3)(E), as explained *infra*.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

1. Section 2255 of Title 28 of the United States Code authorizes a federal prisoner to file a collateral attack on his conviction and sentence. Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, amended Section 2255 in a number of ways, including by imposing stricter limitations on the filing of second or successive motions. Section 2255 now provides, in paragraph 8, that a second or successive motion "must be certified as provided in section 2244 by a panel of the appropriate court of appeals" to contain either (1) newly discovered evidence that, when viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the prisoner guilty or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Under subsection (b)(2) of Section 2244, a state prisoner seeking to file a second or successive habeas corpus application under 28 U.S.C. 2254, like a federal prisoner seeking to file a second or successive motion under 28 U.S.C. 2255, must show that the application relies either on a new rule of constitutional law that applies retroactively or on new evidence that establishes his innocence. Subsection (b)(3) of Section 2244 provides that, before a state prisoner may file a second or successive habeas corpus application, the applicant "shall move in the appropriate court of appeals for an order authorizing the district court to consider the

application," 28 U.S.C. 2244(b)(3)(A); that such a motion "shall be determined by a three-judge panel of the court of appeals," 28 U.S.C. 2244(b)(3)(B); that a second or successive application may be authorized by the panel "only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection," 28 U.S.C. 2244(b)(3)(C); and that the panel must grant or deny authorization to file a second or successive application "not later than 30 days after the filing of the motion," 28 U.S.C. 2244(b)(3)(D). The final paragraph of Section 2244(b)(3), paragraph (E), provides that the panel's "grant or denial of an authorization * * * to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

2. In 1992, following a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted of conspiracy to possess with the intent to distribute and to distribute cocaine, in violation of 21 U.S.C. 846, and conspiracy to import cocaine, in violation of 21 U.S.C. 963. J.A. 3. He was sentenced to 240 months' imprisonment. J.A. 5. The court of appeals affirmed, 17 F.3d 333 (11th Cir. 1994), and this Court denied certiorari, 513 U.S. 950 (1994).

3. On July 11, 1994, petitioner filed a *pro se* motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. J.A. 7-104.[1] He argued, among other

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[1] The version of Rule 33 then in effect provided as follows:

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant

things, that an immunity agreement that a government witness had entered into with another United States Attorney's Office several years before his trial constituted newly discovered evidence that the government failed to disclose in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972). J.A. 13-26. In its response to the motion, the government stated that petitioner's allegation of a "*Brady/Giglio* violation is more properly cognizable under a motion pursuant to 28 U.S.C. § 2255," but that it had "no objection to [petitioner's] motion for new trial being considered as demanding relief under both Rule 33 and 28 U.S.C. § 2255." J.A. 110. The government went on to argue that disclosure of the immunity agreement, which the prosecutor in petitioner's case had not known about at the time of petitioner's trial, would not have affected the trial's outcome, J.A. 109-113, and that petitioner was therefore not entitled to relief "[w]hether his motion is considered under Rule 33, Fed. R. Crim. P. or treated as though filed pursuant to 28 U.S.C. § 2255," J.A. 114. In his reply to the government's response, petitioner argued that his motion was properly filed under Rule 33, because, in his view, a motion under Section 2255 must be based on a defect on the face of the record. In contrast, he stated, when "a motion is based upon some extrinsic defect which does not appear on the face of the record or pleadings, the

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the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty [sic] or within such further time as the court may fix during the 7-day period.

Fed. R. Crim. P. 33 (1994).

proper means of attack is a motion for a new trial." J.A. 116.[2]

On October 28, 1994, the district court denied the motion. J.A. 137-146. The court noted that the government had no objection to the motion's "being treated as demanding relief under both Rule 33 and 28 U.S.C. § 2255," and stated that it would therefore "consider [petitioner's] motion as requesting both kinds of relief." J.A. 139-140. Addressing petitioner's claim that the government had improperly failed to disclose the immunity agreement, the court concluded that, because the agreement would have had minimal impeachment value, there was no reasonable probability that disclosure of the agreement would have changed the outcome of the trial. J.A. 141-142.

In his appeal, petitioner challenged the district court's denial of his motion and its refusal to hold an evidentiary hearing, but he did not challenge the district court's decision to treat the motion as one brought under both Rule 33 and Section 2255. See 94-9270 Pet. C.A. Br. 10-41; 94-9270 Pet. C.A. Reply Br. 5-21. On March 19, 1996, the court of appeals affirmed in an unpublished per curiam order. J.A. 147. After observing that petitioner's appeal was "from the denial of relief in regard to a combined motion to vacate, set aside or correct sentence, 28 U.S.C. § 2255, and motion for new trial, Fed. R. Crim. P. 33," the court stated that

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[2] In fact, Section 2255 motions may, and often are, based on new evidence that is not contained in the existing record. See Rules 4, 6, 7, and 8 of the Rules Governing Section 2255 Proceedings for the United States District Courts. See also *Massaro* v. *United States*, 123 S. Ct. 1690, 1694 (2003) (ineffective assistance of counsel); *United States* v. *Bagley*, 473 U.S. 667, 671-672 (1985) (*Brady* claim raised in motion under 28 U.S.C. 2255).

it was affirming "for the reasons set forth * * * [by] the district court." J.A. 147.

4. On April 22, 1997, petitioner filed a motion under 28 U.S.C. 2255. J.A. 148-161. The motion repeated the claims made in the earlier motion and added several others, including a claim that his trial counsel had rendered ineffective assistance by failing to file a motion to suppress statements on the grounds that they were taken in violation of his Sixth Amendment right to counsel and were involuntary. J.A. 154. In its response, the government argued, among other things, that petitioner's Section 2255 motion was a successive motion that should be dismissed under the abuse of the writ doctrine and AEDPA's gatekeeping provisions. Gov't Resp. in Opp. to Pet. Successive Mot. Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence 10-12. The district court denied the Section 2255 motion without addressing whether it was successive. J.A. 162-164.

After granting petitioner a certificate of appealability on the claim that challenged counsel's failure to file a suppression motion, J.A. 165-166, the court of appeals vacated the district court's order denying the Section 2255 motion and remanded for further proceedings, J.A. 167-172. The court of appeals found that the district court had apparently "examined the facts only in reference to the Fifth Amendment law," instead of applying a "Sixth Amendment analysis"; it noted that an evidentiary hearing "would have facilitated the determination of voluntariness," and that the appointment of counsel "would assist the court"; and it raised the "question of whether this petition is successive." J.A. 172. The court therefore directed the district court on remand to "employ Sixth Amendment analysis, develop more fully the facts surrounding [petitioner's] claim and examine

the record to determine if this petition is successive." *Ibid.*

5. After the remand, the government moved to dismiss petitioner's Section 2255 motion. Because petitioner's 1994 motion for a new trial had been treated as a Section 2255 motion, the government argued, his current motion was a second or successive motion that had not been authorized by the court of appeals, as AEDPA requires, and the court was therefore required to dismiss it. Gov't Mot. to Dismiss Castro's Successive Pet. Pursuant to 28 U.S.C. § 2255, at 3-5. A magistrate judge agreed with the government and recommended that the motion be dismissed. J.A. 175-181.

Adopting the magistrate judge's report and recommendation, the district court ruled that petitioner's Section 2255 motion was successive. J.A. 182-185. The court rejected petitioner's claim that his new trial motion should not have been recharacterized without giving him notice of the potential consequences under AEDPA and an opportunity to amend or withdraw the motion. J.A. 182-183. The court found that the government's response to the new trial motion had put petitioner on notice that it might be characterized as a Section 2255 motion; that petitioner had never objected to the recharacterization; and that pre-AEDPA "common law precedent" imposed "the same restrictions on successive petitions" as those imposed by AEDPA. J.A. 183-184. The district court thus concluded that dismissal was appropriate because petitioner "may have known of the consequences of having his motion for a new trial construed as a § 2255 motion and was put on notice of said re-characterization." J.A. 184. The district court nevertheless granted a certificate of appealability on the issue of successiveness. J.A. 186-187.

6. The court of appeals initially vacated the district court's dismissal of petitioner's Section 2255 motion, holding that the motion could not be deemed successive. J.A. 188-197. Acting *sua sponte*, however, and with one judge dissenting, the court of appeals subsequently withdrew its original opinion and substituted an opinion that affirmed the district court's judgment. J.A. 198-208.

In holding that petitioner's Section 2255 motion was successive, the court reasoned that "reliev[ing] an entire class of petitioners from any restriction at all on the filing of a second motion simply because their first motions had been recharacterized * * * might undermine the congressional purpose behind the AEDPA, which is to limit successive § 2255 petitions," and that a court should not create such an exception "[w]ithout being given any additional instruction by Congress." J.A. 204. Because petitioner's Section 2255 motion was successive, and because it did not "contain newly discovered evidence" or "address a new rule of constitutional law," the court held that it failed to satisfy AEDPA's requirements. J.A. 203. The court stated, however, that it shared the "substantial fairness concerns" of the other courts of appeals that had addressed the issue of successiveness in cases in which the first motion had been recharacterized, J.A. 203, 206, and it urged district courts in future cases to "warn petitioners of the consequences of recharacterizing their motions as § 2255 petitions" and to "provide them with the opportunity to amend or dismiss their filings," J.A. 203, 205.

Judge Roney dissented. J.A. 207-208. In his view, the court should have followed the cases from other courts of appeals holding that a recharacterized post-conviction motion ordinarily will not count as a first

Section 2255 motion for purposes of AEDPA's limitation on second or successive motions. *Ibid.*

SUMMARY OF ARGUMENT

I. Title 28 U.S.C. 2244(b)(3)(E) provides that "[t]he * * * denial of an authorization by a court of appeals to file a second or successive application * * * shall not be the subject of a petition * * * for a writ of certiorari." Under that provision, this Court lacks jurisdiction to review the court of appeals' decision in this case.

As an initial matter, Section 2244(b)(3)(E) applies to Section 2255 motions. Paragraph 8 of Section 2255 requires that a second or successive motion be certified by a court of appeals panel "as provided in section 2244," which establishes several substantive and procedural requirements for the filing of habeas corpus applications by state prisoners. The natural reading of this language is that a motion for authorization to file a second or successive Section 2255 motion is to be governed by the procedural rules set forth in Section 2244, one of which is the rule of finality in Section 2244(b)(3)(E) for the "denial" of such authorization.

The "denial of an authorization * * * to file a second or successive [motion]" encompasses two subsidiary determinations: that the motion is second or successive, and that the prisoner has not made a prima facie showing that the gatekeeping requirements have been satisfied. If Congress had intended to deprive this Court of jurisdiction to review only the latter determination, it could have used narrower language, as it did in Section 2244(b)(3)(C), which speaks of the gatekeeping requirements alone. This interpretation is consistent with *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), which holds that Section 2244(b)(3)(E) does not withhold jurisdiction to review a court of appeals'

determination that an application is *not* second or successive. This Court has jurisdiction in such a case because there has been no "grant or denial of an authorization * * * to file a second or successive application." When there is such a denial, further appellate review is barred.

Finally, while it might be argued that Section 2244(b)(3)(E) applies only when the court of appeals' determinations are made in denying a motion for authorization to file a second or successive Section 2255 motion, the better view is that the jurisdictional limitation also applies when those determinations are made in deciding an appeal from the dismissal of a motion. Section 2244(b)(3)(E), by its terms, applies to the denial of authorization to file a second or successive application, and such authorization can be denied in deciding an appeal. Moreover, a prisoner is ordinarily able to challenge a district court's determination that his Section 2255 motion is second or successive either by appeal or by motion, and it would be odd if this Court's jurisdiction depended on how the case arrived at the court of appeals.

II. If this Court determines that it has jurisdiction, it should affirm the decision of the court of appeals. Petitioner contends that the district court erred in treating his first post-conviction motion as one filed under 28 U.S.C. 2255, but he did not raise that claim when he appealed the district court's denial of the motion. The district court's characterization of petitioner's first motion was therefore the law of the case when he filed his second one.

When an issue is decided by a district court, the losing party challenges the decision on appeal, and the court of appeals rules against him, the court of appeals' decision is the law of the case, and binds the parties at

subsequent stages of the litigation. When an issue is decided by a district court and the losing party does *not* challenge the decision on appeal, the decision of the *district court* becomes the law of the case. The two situations are treated identically because it would make little sense for a party that does not raise a claim to be in a better position than a party that does raise the claim and loses.

Requiring parties to raise claims at the earliest opportunity reduces the need for subsequent appeals, and thereby promotes judicial efficiency. It also promotes finality, an interest that is particularly compelling in the context of post-conviction proceedings. Principles of waiver and forfeiture are fundamental features of the procedural rules that govern such proceedings, see, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467 (1991) (abuse of the writ); *United States* v. *Frady*, 456 U.S. 152 (1982) (procedural default), and these principles should govern challenges to the characterization of a post-conviction motion. While it is true that petitioner filed his first post-conviction motion before AEDPA was enacted, there is no unfairness in holding him accountable for his failure to challenge the characterization of his motion in the appeal from its denial, because second or successive Section 2255 motions were severely limited by abuse of the writ principles even before AEDPA. See *McCleskey*, *supra*.

Petitioner contends that a post-conviction motion should not be treated as a Section 2255 motion unless the district court gave the prisoner notice of its intention to do so and an opportunity to amend or withdraw the motion. Both the decision on which petitioner relies for that proposition, *Adams* v. *United States*, 155 F.3d 582 (2d Cir. 1998), and the majority of the decisions that follow it are consistent with law of the case principles,

because the prisoner in those cases challenged the characterization of his post-conviction motion in an appeal from the denial of the motion, not when he filed a subsequent one.

Principles of law of the case, waiver, and forfeiture will not be applicable to characterization decisions in cases in which the prisoner has challenged the decision at the earliest opportunity. See, *e.g.*, *Abdur'Rahman* v. *Bell*, 123 S. Ct. 594 (2002) (dismissing writ of certiorari as improvidently granted). If the Court again grants certiorari in such a case, it will be necessary to develop standards for determining when a post-conviction motion is to be treated as a Section 2255 motion. But it is not necessary to do so here. This case should be decided on the ground that a characterization decision must be challenged at the time it is made.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW THE COURT OF APPEALS' DECISION AFFIRMING THE DISMISSAL OF PETITIONER'S SECTION 2255 MOTION AS SECOND OR SUCCESSIVE

The district court dismissed petitioner's Section 2255 motion as second or successive and the court of appeals affirmed. Petitioner asks this Court to reverse the decision of the court of appeals. The threshold issue is whether 28 U.S.C. 2244(b)(3)(E), which provides that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application * * * shall not be the subject of a petition * * * for a writ of certiorari," deprives this Court of jurisdiction to consider petitioner's request. Whether it does depends on the answers to three questions. The first question is whether Section 2244(b)(3)(E) applies to a federal prisoner's motion under Section 2255. The second

question is whether Section 2244(b)(3)(E) applies both to a court of appeals' determination that AEDPA's gatekeeping requirements have not been satisfied and to its antecedent determination that the motion is second or successive. The third question is whether Section 2244(b)(3)(E) applies when the court of appeals makes these determinations in affirming the dismissal of a Section 2255 motion as second or successive. As explained below, the answer to each of these questions is yes. The Court therefore lacks jurisdiction to review the court of appeals' decision.

A. Section 2244(b)(3)(E) Applies To A Section 2255 Motion

Under paragraph 8 of 28 U.S.C. 2255, a second or successive motion by a federal prisoner must be certified by a court of appeals panel "as provided in section 2244" to contain either new evidence that establishes the defendant's innocence or a new rule of constitutional law that applies retroactively. Subsection (b)(2) of Section 2244 imposes similar gatekeeping requirements on state prisoners seeking to file a second or successive application under Section 2254. Subsection (b)(3) of Section 2244 establishes the procedural rules for obtaining authorization to file a second or successive Section 2254 application, including the prohibition against challenging the grant or denial of authorization by appeal, petition for rehearing, or petition for a writ of certiorari, 28 U.S.C. 2244(b)(3)(E).[3]

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[3] The other procedural requirements are the following: subsection (b)(3)(A) requires that an order authorizing a second or successive application be sought from the court of appeals; subsection (b)(3)(B) requires that a motion for such an order be determined by a three-judge panel; subsection (b)(3)(C) prohibits the court of appeals from authorizing a second or successive application unless

Petitioner apparently concedes that Section 2244(b)(3)(E)'s prohibition against certiorari review of gatekeeping determinations is incorporated in paragraph 8 of Section 2255 by virtue of that paragraph's statement that certification is to be "as provided in section 2244." See Br. 12. Petitioner's amicus, however, contends that "[i]t is not clear" that Section 2244(b)(3)(E) applies to Section 2255 motions. NACDL Br. 12 n.2. Petitioner's amicus is mistaken in that view, as every court of appeals to consider the question has found. See *In re Sonshine*, 132 F.3d 1133, 1134 (6th Cir. 1997); *Triestman* v. *United States*, 124 F.3d 361, 367 (2d Cir. 1997); *United States* v. *Lorentsen*, 106 F.3d 278, 279 (9th Cir. 1997).

The natural reading of Section 2255's requirement that a second or successive motion be certified "as provided" in Section 2244 is that such a motion is to be certified *in the manner* described in Section 2244. See *Webster's Third New International Dictionary* 125 (1993) (one meaning of "as" is "in the same way or manner"). The language in paragraph 8 of Section 2255 thus means that a motion for authorization to file a second or successive Section 2255 motion is to be governed by the procedural rules concerning certification that are set forth in Section 2244. Under this straightforward interpretation, subsection (b)(3)(E) is incorporated in Section 2255 because it is one of the procedural rules in Section 2244.

According to petitioner's amicus, Congress might have intended that Section 2244(b)(3)(E) apply to

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there has been a prima facie showing that the gatekeeping requirements in subsection (b)(2) have been satisfied; and subsection (b)(3)(D) requires the court of appeals to grant or deny authorization within 30 days of the filing of the motion.

Section 2254 applications but not to Section 2255 motions because "review on writ of certiorari of a denial of certification to file a second or successive § 2255 motion does not implicate the federalism or comity concerns implicated when federal habeas corpus review of a state court judgment is prolonged." NACDL Br. 12 n.2. But a possible reason for treating state and federal prisoners differently carries no interpretive weight when the text of the provisions treat them the same. In any event, Congress's central motivation for imposing stricter limitations on the filing of second or successive collateral motions was "respect for the finality of criminal judgments." *Calderon* v. *Thompson*, 523 U.S. 538, 558 (1998). See also H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 111 (1996). And "the Federal Government, no less than the States, has an interest in the finality of its criminal judgments." *United States* v. *Frady*, 456 U.S. 152, 166 (1982).[4]

B. Section 2244(b)(3)(E) Applies To A Court Of Appeals' Determination That The Section 2255 Motion Is Second Or Successive

Under Section 2244(b)(3)(E), this Court lacks jurisdiction to review a court of appeals' "grant or denial of an authorization * * * to file a second or successive [motion]." Petitioner contends that this Court has jurisdiction because what he is asking it to review is not "the denial of [an authorization] by the Eleventh Circuit" but "the Eleventh Circuit's decision which

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[4] When Congress did wish to treat state and federal prisoners differently in the provisions of AEDPA that govern second or successive collateral challenges, it did so explicitly. Section 2244(b)(1), for example, prohibits state prisoners from raising in a second or successive Section 2254 application a claim that was raised in a prior application, but there is no such prohibition in Section 2255.

required [authorization] by concluding that [his] § 2255 petition was successive." Br. 12-13. Petitioner's amicus likewise argues that Section 2244(b)(3)(E) "eliminates certiorari jurisdiction with respect to '[t]he grant or denial of an authorization by a court of appeals to file a second or successive application . . . ,' not with respect to a ruling that an application is or is not a second or successive application." NACDL Br. 11-14. Insofar as petitioner and his amicus are suggesting that the court of appeals decided only that his motion was second or successive, they are mistaken. In addition to making that determination (J.A. 200-207), the court determined that the motion did not meet the gatekeeping requirements in paragraph 8 of Section 2255 (J.A. 203). Petitioner's motion, the court said, "does not meet either of the two requirements found under the AEDPA—[it] does not contain newly discovered evidence, nor does [it] address a new rule of constitutional law." *Ibid.* The effect of the court of appeals' decision, therefore, was to deny petitioner "authorization * * * to file a second or successive [motion]." 28 U.S.C. 2244(b)(3)(E).

Insofar as petitioner is claiming that, even if the court of appeals decided more than one issue, he is seeking review only of its decision that his motion was second or successive, his petition is still barred under Section 2244(b)(3)(E). As explained below, that provision makes the certifying panel of the court of appeals the final decisionmaker, not only for the determination of whether the gatekeeping requirements have been satisfied, but also for the determination that the motion is second or successive.

1. The denial of authorization to file a second or successive motion represents a single order that encompasses two legal conclusions: that the Section 2255 motion is second or successive, and that there has been

no prima facie showing that it is based on new evidence that proves the prisoner's innocence or a new rule of constitutional law that applies retroactively. If Congress had intended to deprive this Court of jurisdiction to review only one of the legal determinations, it could have used more precise, and more narrow, language. Instead, the preclusion of review covers the ultimate action—a "grant" or a "denial."

Congress did use narrower language elsewhere in Section 2244(b)(3). Subsection (b)(3)(C) provides that a court of appeals may not authorize the filing of a second or successive application unless the prisoner "makes a prima facie showing that the application satisfies the requirements of this subsection"—*i.e.*, that it is based on new evidence that proves his innocence or a new rule of constitutional law that applies retroactively. If Section 2244(b)(3)(E) had been intended to prevent Supreme Court review only of the determination that those gatekeeping requirements have not been satisfied, Congress could have used in subsection (b)(3)(E) the language that it used in subsection (b)(3)(C); *i.e.*, it could have said that "[t]he determination by a court of appeals of whether the application makes a prima facie showing that it satisfies the requirements of this subsection" may not be the subject of a petition for a writ of certiorari. But it did not do so. In view of the language chosen by Congress, the better reading of Section 2244(b)(3)(E) is that it deprives this Court of jurisdiction to review the entirety of the court of appeals' decision, not some part of it.[5]

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[5] This Court has given a similar interpretation to another jurisdictional statute, albeit one that vested, rather than withholding, jurisdiction. Interpreting 28 U.S.C. 1253, which gives the Court appellate jurisdiction to review a three-judge district court's

2. Contrary to the contention of petitioner's amicus (NACDL Br. 13-14), the conclusion that this Court lacks jurisdiction to review a court of appeals' determination that a Section 2255 motion is second or successive does not conflict with this Court's decision in *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998). That case holds that Section 2244(b)(3)(E) does not deprive the Court of jurisdiction to review a court of appeals' determination that a habeas corpus application is *not* second or successive. *Id.* at 641-642. This Court had jurisdiction in *Martinez-Villareal* because the court of appeals did not "grant or den[y] * * * authorization" to file a second or successive petition, 28 U.S.C. 2244(b)(3)(E); the court of appeals held that there was "no need * * * to apply for authorization," 523 U.S. at 642. In this case, by contrast, the court of appeals concluded that petitioner's motion was second or successive and did not satisfy the gatekeeping requirements of Section 2255. It therefore "deni[ed] * * * authorization" to file the motion. 28 U.S.C. 2244(b)(3)(E).

It is true that, under this interpretation of Section 2244(b)(3)(E), only the government—or, in a case involving 28 U.S.C. 2254, the state—will be able to petition this Court for review of a court of appeals' determination of whether a collateral challenge is second or successive. But such asymmetry in a statute governing this Court's jurisdiction is not without precedent.

"order granting or denying * * * an * * * injunction," the Court has held that an appeal under that provision "brings the 'whole case' before the Court," *Fusari* v. *Steinberg*, 419 U.S. 379, 388 n.13 (1975) (quoting *United States* v. *Raines*, 362 U.S. 17, 27 n.7 (1960)), and that it has "jurisdiction of the entire appeal" from the order granting injunctive relief, including the declaratory judgment that was the "predicate" for the injunction, *White* v. *Regester*, 412 U.S. 755, 760-761 (1973).

Under 28 U.S.C. 1252, which was repealed in 1988, the Court had appellate jurisdiction to review a decision of "any court of the United States * * * holding an Act of Congress unconstitutional in any civil action * * * to which the United States or any of its agencies, * * * officer[s] or employee[s] is a party." 28 U.S.C. 1252 (1982). That statute treated the government more favorably than the opposing party in two respects. First, while a district court's decision invalidating a federal law could be appealed directly to this Court, a district court's decision upholding the law could not be. Second, while this Court's jurisdiction to review a court of appeals' decision invalidating a federal law was appellate (and therefore mandatory), the Court had only certiorari (and therefore discretionary) jurisdiction to review a court of appeals' decision upholding the law. Any suggestion that Congress could not have intended to accord preferential treatment to the government in obtaining review by this Court would be difficult to reconcile with the fact that Congress once did so explicitly in another statute.[6]

3. The conclusion that this Court lacks jurisdiction to review a court of appeals' determination that a Section 2255 motion is second or successive does not conflict with the view that a factual or legal determination by an *administrative agency* that triggers a preclusion of review provision may be subject to judicial review.

[6] The fact that the government can seek review of a court of appeals' determination that a motion is not second or successive answers any objection that the proposed interpretation of Section 2244(b)(3)(E) would deprive this Court of the ability to establish uniform standards for determining whether a motion is second or successive. See, *e.g.*, *Martinez-Villareal*, 523 U.S. at 641-646 (holding that habeas corpus application is not second or successive when it was previously dismissed as premature).

Cf. *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 283 (1978) (preclusion of review of EPA "emission standard" in criminal case did not bar review of question whether particular agency regulation was "emission standard"). For example, 8 U.S.C. 1252(a)(2)(C) provides that "no court shall have jurisdiction to review any final [administrative] order of removal against an alien who is removable by reason of having committed a [certain type of] criminal offense," including an aggravated felony. Interpreting the provision in *Calcano-Martinez* v. *INS*, 533 U.S. 348 (2001), the Court observed that "[t]he scope of this preclusion is not entirely clear," and that, although "the text of the provision is quite broad," it is "not without its ambiguities." *Id.* at 350 n.2. The Court then noted the government's concession that, while Section 1252(a)(2)(C) prohibits courts of appeals from reviewing challenges to removal orders, it does not deprive them of "the power to hear petitions challenging the factual determinations thought to trigger the jurisdiction-stripping provision (such as whether an individual is an alien and whether he or she has been convicted of an 'aggravated felony' within the meaning of the statute)." *Ibid.* These issues, however, were not presented in the case, and the Court did not address them. See *ibid.*

The jurisdictional question in this case, moreover, is different from the one in *Calcano-Martinez*. Interpreting 8 U.S.C. 1252(a)(2)(C) to preclude judicial review even of questions subsidiary to removability would prevent an alien from obtaining access to the courts on any question related to removability, and would give an Executive Branch agency the final say on all such issues. Under the proposed interpretation of 28 U.S.C. 2244(b)(3)(E), in contrast, it is not an administrative agency but a federal court of appeals panel that has

the final say on the subsidiary issue in question (whether a motion is second or successive), and the only judicial review that is unavailable to a prisoner is rehearing by the court of appeals and the exercise of this Court's discretionary jurisdiction. To the extent that a narrow interpretation of Section 1252(a)(2)(C) may be justified by the "presumption that Congress intends judicial review of administrative action," *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), that concern is not present here. See also *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001) (referring to "the strong presumption in favor of judicial review of administrative action" in case holding that 8 U.S.C. 1252(a)(2)(C) does not deprive courts of jurisdiction under 28 U.S.C. 2241 to decide question relating to alien's deportability).

C. Section 2244(b)(3)(E) Applies To An Appeal Affirming The Dismissal Of A Section 2255 Motion As Second Or Successive

The court of appeals' determination that petitioner's Section 2255 motion was second or successive was made in deciding an appeal from the dismissal of the motion, rather than a request by petitioner for authorization to file a second or successive motion. Section 2244(b)(3)(E) nevertheless deprives this Court of jurisdiction to review the court of appeals' decision. A contrary view would permit a defendant to circumvent the restrictions Congress placed on review of gatekeeping decisions simply by taking a different route to the court of appeals.

1. What Section 2244(b)(3)(E) deprives this Court of jurisdiction to review is not the grant or denial of *a motion* for authorization to file a second or successive application, but the grant or denial of "an authorization"

to file one. If, instead of filing a motion in the court of appeals, a prisoner appeals the dismissal of a Section 2255 motion found to be second or successive, and if the court of appeals, in deciding the appeal, determines that AEDPA's gatekeeping requirements have not been satisfied, the effect of its decision is to deny authorization to file the motion. That is what happened here.

2. While AEDPA specifies a procedure for seeking authorization to file a second or successive Section 2255 motion, it does not specify a procedure for challenging a district court's determination that a motion is second or successive. The lower courts generally permit the challenge to be made either in an appeal of the district court's decision or in a Section 2244(b) authorization motion.[7] Since it is unlikely that Congress intended

[7] District courts in some circuits are required to transfer an unauthorized second or successive Section 2255 motion to the court of appeals under 28 U.S.C. 1631, see *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997); *Coleman* v. *United States*, 106 F.3d 339, 341 (10th Cir. 1997); *Liriano* v. *United States*, 95 F.3d 119, 123 (2d Cir. 1996); see also *Abdur'Rahman* v. *Bell*, 123 S. Ct. 594, 596 & n.7 (2002) (Stevens, J., dissenting from dismissal of writ of certiorari as improvidently granted) (Section 2254 motion), while district courts in other circuits may either transfer such a motion or simply dismiss it, see *United States* v. *Winestock*, No. 02-6304, 2003 WL 1949822, at *6 (4th Cir. Apr. 25, 2003); *Boyd* v. *United States*, 304 F.3d 813, 814 (8th Cir. 2002), cert. denied, 123 S. Ct. 1642 (2003); *Pratt* v. *United States*, 129 F.3d 54, 57 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998). In cases in which the district court dismisses, courts of appeals have permitted a prisoner to challenge the finding that the motion is second or successive either by filing a motion in the court of appeals under Section 2244(b), see, *e.g.*, *Henderson* v. *United States*, 264 F.3d 709 (7th Cir. 2001); *In re Moore*, 196 F.3d 252 (D.C. Cir. 1999); *In re Tolliver*, 97 F.3d 89 (5th Cir. 1996); see also *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 641 (1998) (Section 2254 motion), or by filing an appeal from the dismissal, see, *e.g.*, *McIver* v. *United States*, 307 F.3d 1327 (11th Cir. 2002);

that the jurisdiction of this Court would depend on the happenstance that the parties and the courts chose one rather than another of two available procedural mechanisms, Section 2244(b)(3)(E) should be construed to apply to both. It would make little sense if this Court could review a determination that a Section 2255 motion is second or successive when the determination is made in deciding an appeal, but could not do so when it is made in ruling on an authorization motion.

3. While it might be argued that the only proper way to challenge a district court's determination that a motion is second or successive is by filing an appeal (assuming the prisoner is able to obtain a certificate of appealability[8]), and that the only proper purpose of a Section 2244(b) motion is to convince the court of appeals that the gatekeeping requirements have been satisfied, there is tension, if not inconsistency, between that view and AEDPA's purposes. If a motion that the district court finds to be second or successive is not transferred to the court of appeals and an appeal from the dismissal is not treated as a motion under Section 2244(b), the prisoner might still be able to file a sepa-

United States v. *Palmer*, 296 F.3d 1135 (D.C. Cir. 2002); *Garrett* v. *United States*, 178 F.3d 940 (7th Cir. 1999), although courts of appeals routinely treat a notice of appeal as a request for authorization under Section 2244(b), see, *e.g.*, *Winestock*, 2003 WL 1949822, at *7; *United States* v. *Hayden*, 255 F.3d 768, 770 n.3 (9th Cir.), cert. denied, 534 U.S. 969 (2001); *Pratt*, 129 F.3d at 58; *Nuñez* v. *United States*, 96 F.3d 990, 991 (7th Cir. 1996).

[8] To obtain a certificate of appealability, see 28 U.S.C. 2253(c), a prisoner must show that "jurists of reason would find it debatable [both] whether the [motion] states a valid claim of the denial of a constitutional right and * * * whether the district court was correct in its procedural ruling," *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000).

rate motion in the court of appeals in which he requests permission to file a second or successive Section 2255 motion. At least in some cases, the appeal and the motion would then proceed on different tracks. The result in such cases would be a multiplication of proceedings and delay, two consequences that are squarely at odds with AEDPA's goals of "simplify[ing] and speed[ing] the federal habeas process," *Breedlove* v. *Moore*, 279 F.3d 952, 959 (11th Cir. 2002), cert. denied, 123 S. Ct. 1278 (2003), "discourag[ing] repetitive and piecemeal litigation," *Triestman* v. *United States*, 124 F.3d 361, 378 (2d Cir. 1997), and "streamlin[ing] the [second or successive] habeas application process," *Browning* v. *United States*, 241 F.3d 1262, 1266 (10th Cir. 2001).

The better view is that a Section 2244(b) motion in the court of appeals is the appropriate vehicle for challenging a district court's determination that a Section 2255 motion is second or successive. While AEDPA itself does not require a district court to transfer a second or successive Section 2255 motion to the court of appeals, and does not require a court of appeals to treat an appeal from a dismissal of such a motion as an authorization request under Section 2244(b), courts "must exercise [their] discretion in a manner consistent with the objects of the statute." *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998). Since AEDPA's purposes would be impaired if a prisoner were able to litigate in different proceedings, at different times, claims that bear upon his ability to file a Section 2255 motion determined by a district court to be second or successive, district courts should transfer Section 2255 motions that they find to be second or successive, and courts of appeals should treat appeals from motions

that are dismissed (rather than transferred) as motions for authorization under Section 2244(b).

4. In the absence of a categorical requirement that a Section 2244(b) motion be used to challenge a district court's determination that a Section 2255 motion is second or successive, there may be decisions on appeal from the dismissal of a second or successive motion that this Court will have jurisdiction to review. If a court of appeals affirms a district court's dismissal of a Section 2255 motion as second or successive and, unlike the court of appeals in this case, does not address the question whether the gatekeeping requirements have been satisfied, the court can probably not be said to have "deni[ed] * * * authorization * * * to file a second or successive application." 28 U.S.C. 2244(b)(3)(E). That this Court's jurisdiction would depend on whether the court of appeals addressed the gatekeeping issue in affirming the dismissal of a Section 2255 motion as second or successive is perhaps the strongest objection to the interpretation of Section 2244(b)(3)(E) under which appeals and Section 2244(b) motions are treated identically.

On balance, however, that is not a sufficiently strong objection to compel a contrary interpretation. First, the best evidence of congressional intent is the language of the statute, and the language of Section 2244(b)(3)(E), fairly read, is broad enough to cover appeals. Second, if there is a loophole in Section 2244(b)(3)(E) for appeals from dismissals in which no decision is reached on the gatekeeping issue, the loophole is small, because there are unlikely to be many such cases. District courts often transfer to the court of appeals, as gatekeeper, a Section 2255 motion found to be second or successive. When such a motion is not transferred but dismissed, a prisoner may be unable to

obtain a certificate of appealability. Even when a certificate of appealability has been granted, courts of appeals often treat an appeal from a dismissal as a motion for authorization. And when such an appeal is not explicitly treated as an authorization motion, courts of appeals, in affirming the dismissal, may often find, as will obviously be the case, that the prisoner has not satisfied the gatekeeping requirements. Therefore, any potential loophole where a court of appeals does not decide the gatekeeping issue should not dictate the result where the court of appeals does decide the issue, and thereby renders a "denial" of authorization to file a Section 2255 motion within the meaning of Section 2244(b)(3)(E). In the latter situation, which is this case, Congress's purpose to streamline, simplify, and speed the process of post-conviction litigation supports ending the proceedings with the decision of the court of appeals.

II. THE DISTRICT COURT CORRECTLY DISMISSED PETITIONER'S SECTION 2255 MOTION AS SECOND OR SUCCESSIVE

If this Court concludes that it has jurisdiction to consider petitioner's claim that his Section 2255 motion is not second or successive, the claim should be rejected. The district court treated petitioner's first post-conviction motion as one filed under both Federal Rule of Criminal Procedure 33 and 28 U.S.C. 2255, and denied it; the court of appeals affirmed; and petitioner did not seek this Court's review. The decision that petitioner's first motion should be regarded as a Section 2255 motion was thus the law of the case when petitioner filed his second motion, and is not subject to challenge now.

A. The District Court's Characterization Of Petitioner's First Post-Conviction Motion Was The Law Of The Case When Petitioner Filed His Second Post-Conviction Motion

There is no dispute that petitioner's second post-conviction motion was brought under 28 U.S.C. 2255. What is in dispute is whether the motion is "second or successive." Petitioner and his amicus contend that it was not. They argue that his first motion was properly filed under Rule 33; that petitioner did not consent to its characterization as a motion under Section 2255; and that he was not given notice that it would be so characterized. Pet. Br. 14-25; NACDL Br. 14-26. But no such challenge was made to the district court's characterization of petitioner's first post-conviction motion in his appeal from the denial of that motion, despite the fact that he had an opportunity and incentive to do so. As explained below, the district court's characterization of petitioner's first post-conviction motion was therefore the law of the case when he filed his second post-conviction motion, and his belated challenge was properly rejected.

1. *When a district court's decision is not challenged on appeal, it is the law of the case at later stages of the litigation*

Under the doctrine of law of the case, "when an issue is once litigated and decided, that should be the end of the matter," *United States* v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950), and "th[e] decision should continue to govern the same issues in subsequent stages in the same case," *Arizona* v. *California*, 460 U.S. 605, 618 (1983). Like res judicata and collateral estoppel, law of the case is a principle of preclusion. It "promotes the finality and effi-

ciency of the judicial process by 'protecting against the agitation of settled issues,'" *Christianson* v. *Colt Industrial Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting 1B James W. Moore et al., *Moore's Federal Practice* ¶ 0.404[1], at 118 (1984)), and prevents "obstinate litigant[s] * * * , by repeated appeals, [from] compel[ling] a court to listen to criticisms on their opinions," *Roberts* v. *Cooper*, 61 U.S. (20 How.) 467, 481 (1857).

When a party challenges a district court's decision on appeal and the court of appeals rules against him, the court of appeals' decision becomes the law of the case in subsequent proceedings in the district court. See, *e.g.*, *Great W. Tel. Co.* v. *Burnham*, 162 U.S. 339, 343-344 (1896); *White* v. *Murtha*, 377 F.2d 428, 431, 432 (5th Cir. 1967). For example, when an issue is decided against a criminal defendant on direct appeal from his conviction and sentence, the decision is law of the case when the defendant later files a motion to correct his sentence under Federal Rule of Criminal Procedure 35, see *United States* v. *Mazak*, 789 F.2d 580, 581-582 (7th Cir. 1986); *Paul* v. *United States*, 734 F.2d 1064, 1065-1066 (5th Cir. 1984), or a motion under 28 U.S.C. 2255, see *United States* v. *Hayes*, 231 F.3d 1132, 1139-1140 (9th Cir. 2000); *Daniels* v. *United States*, 26 F.3d 706, 711-712 (7th Cir. 1994). Law of the case has likewise been held to preclude relitigation of an issue raised in a later habeas corpus petition when the issue was decided against the prisoner on appeal from the denial of an earlier petition. See *Shore* v. *Warden*, 942 F.2d 1117, 1122-1124 (7th Cir. 1991), cert. denied, 504 U.S. 922 (1992); *Raulerson* v. *Wainwright*, 753 F.2d 869, 875 (11th Cir. 1985).

Law of the case is also applicable when a losing party does *not* challenge an adverse district court decision on

appeal. In such a case, the decision of the *district court* becomes the law of the case. In a frequently quoted passage, the D.C. Circuit has stated the principle this way:

> Under law of the case doctrine, a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.

Williamsburg Wax Museum, Inc. v. *Historic Figures, Inc.*, 810 F.2d 243, 250 (1987). Accord *United States* v. *Escobar-Urrego*, 110 F.3d 1556, 1560 (11th Cir. 1997); *North River Ins. Co.* v. *Philadelphia Reins. Corp.*, 63 F.3d 160, 164 (2d Cir. 1995), cert. denied, 516 U.S. 1184 (1996); *Capps* v. *Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993); *United States* v. *Bell*, 988 F.2d 247, 250 (1st Cir. 1993). As Judge Friendly has explained, the reason for treating an unchallenged ruling of the district court as the law of the case is that "[i]t would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *Fogel* v. *Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), cert. denied, 459 U.S. 828 (1982). Applying law of the case under these circumstances "forc[es] parties to raise issues whose resolution might spare the court and parties later rounds of * * * appeals." *Hartman* v. *Duffey*, 88 F.3d 1232, 1236 (D.C. Cir. 1996), cert. denied, 520 U.S. 1240 (1997).

It is sometimes said that the doctrine of law of the case applies only when the court of appeals has actually decided the issue at an earlier stage of the litigation,

and that the analysis when the district court's decision was not challenged on appeal involves the distinct principles of waiver and forfeiture. See *Crocker* v. *Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir.), cert. denied, 516 U.S. 865 (1995); 18B Charles A. Wright et al., *Federal Practice and Procedure* § 4478.6, at 820-828 (2d ed. 2002).[9] But whatever the appropriate terminology, the substance of the rule is the same: a party that fails to challenge a decision on appeal is generally bound by the decision in later stages of the litigation.

2. Petitioner did not challenge the district court's characterization of his first post-conviction motion when he appealed the denial of the motion

a. When petitioner filed his first post-conviction motion in 1994, he objected to its being characterized as a motion under Section 2255. J.A. 116. See pp. 4-5 & note 2, *supra*. His objection was not sustained. The district court treated the motion as one requesting relief under both Rule 33 and Section 2255, J.A. 139-140, and denied it. In his appeal, petitioner challenged the district court's denial of relief and its refusal to hold an evidentiary hearing, but he did not challenge the district court's characterization of his motion. See 94-9270 Pet. C.A. Br. 10-41; 94-9270 Pet. C.A. Reply Br. 5-21. Describing the district court's decision as "the denial of relief in regard to a combined motion to vacate, set aside or correct sentence, 28 U.S.C. § 2255, and motion for new trial, Fed. R. Crim. P. 33," J.A. 147, the court of appeals summarily affirmed. Petitioner did not seek review in this Court.

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[9] Waiver is the "intentional relinquishment or abandonment of a known right," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), while forfeiture is the "failure to make the timely assertion of a right," *United States* v. *Olano*, 507 U.S. 725, 733 (1993).

When petitioner filed his second post-conviction motion in 1997, it was denied on the merits, but the court of appeals vacated the decision and directed the district court to "examine the record" on remand to "determine if this petition is successive." J.A. 172. On remand, in his opposition to the government's motion to dismiss, and again in his objections to the magistrate judge's recommendation that the government's motion be granted, petitioner argued, for the first time since his first post-conviction motion was filed, that the district court had erred in treating the motion as one under Section 2255. Pet. Resp. to Gov't Mot. to Dismiss 2-4; Pet. Objections to Magistrate Judge's Report & Recommendation 2-11. In its response to petitioner's opposition, and again in its response to his objections, the government pointed out that petitioner "never took issue with the district court's designation of the motion as one pursuant to section 2255 in his initial or reply * * * brief" on appeal from the denial of the motion. Gov't Post-Hearing Br. 6-7; Gov't Response to Combined Objections to Report & Recommendation 2. After the district court granted the government's motion to dismiss and granted petitioner's motion for a certificate of appealability, petitioner filed an appeal, arguing, again, that his first post-conviction motion had been improperly characterized as a motion under Section 2255. 01-12181-I Pet. C.A. Br. 8-24. In its brief on appeal, the government again pointed out that petitioner had not challenged that characterization in his appeal from the denial of the motion, 01-12181-I Gov't C.A. Br. 10-12, and argued that his "failure to pursue an objection in the 1994 proceeding precludes him from

complaining about the characterization now," *id.* at 12. The court of appeals affirmed.[10]

If, in his appeal from the denial of his first post-conviction motion, petitioner had challenged the district court's decision to treat the motion as one under Section 2255, and if the court of appeals had explicitly held that the characterization was proper, the court of appeals' decision would certainly have bound the parties when petitioner filed his second post-conviction motion. The result should be the same when there has been a failure to challenge the district court's decision in the appeal of the denial of the first motion. If petitioner had called the characterization issue to the attention of the court of appeals at the first available opportunity, the present appeal could have been avoided, and there might finally have been an end to the challenges to the verdict of the jury that found petitioner guilty more than a decade ago.

b. While law of the case is "only a discretionary rule of practice," *United States Smelting Refining & Mining*

[10] The government thus, in substance, relied on law of the case preclusion principles in the court below and is free to defend the judgment on that ground. See, *e.g.*, *Reno* v. *Flores*, 507 U.S. 292, 300 n.3 (1993). Although the government did not advance the law of the case argument in its brief in opposition, it has not thereby waived the argument. The question presented in the certiorari petition was whether, when a district court "re-characterizes a pro-se federal prisoner's first post conviction [sic] motion as a habeas petition under 28 U.S.C. § 2255," such recharacterization "render[s] the prisoner's subsequent attempt to file a first titled § 2255 petition a 'second or successive petition' [under AEDPA]." Pet. 2. While an "objection to consideration of a question presented * * * may be deemed waived unless called to the Court's attention in the brief in opposition," Sup. Ct. R. 15.2, the doctrine of law of the case is not the basis for an objection to considering the question presented. It is the basis for answering the question.

Co., 339 U.S. at 199, and "not an inexorable command," *White* v. *Murtha*, 377 F.2d at 431, the doctrine "should not be lightly disregarded," *Shore*, 942 F.2d at 1123 (citation omitted). An issue decided at one stage of a case may be relitigated at a later stage only in "extraordinary circumstances." *Christianson*, 486 U.S. at 817. The justifications for applying the law of the case doctrine are especially compelling in the context of post-conviction proceedings, where principles of waiver and forfeiture are fundamental features of the procedural rules developed by this Court. In *United States* v. *Frady*, 456 U.S. 152 (1982), for example, the Court held that a prisoner who failed to raise a claim at trial or on direct appeal may not raise the claim in a Section 2255 motion unless he demonstrates "cause" that excuses the default and "actual prejudice" from the asserted error. *Id.* at 167. And in *McCleskey* v. *Zant*, 499 U.S. 467 (1991), the Court interpreted the pre-AEDPA abuse of the writ doctrine to mean that a prisoner who failed to raise a claim in his first habeas corpus application may not raise it in a second application unless he demonstrates cause and prejudice or actual innocence. *Id.* at 493-496. The primary purpose of these rules, the Court has explained, is to vindicate "society's legitimate interest in the finality of [a criminal] judgment," *Frady*, 456 U.S. at 164, without which "the criminal law is deprived of much of its deterrent effect," *McCleskey*, 499 U.S. at 491 (quoting *Teague* v. *Lane*, 489 U.S. 288, 309 (1989)). See also *Calderon* v. *Thompson*, 523 U.S. 538, 554-555 (1998).

A similar principle should govern in cases like this one. When a federal prisoner fails to challenge on appeal from the denial of a post-conviction motion the district court's characterization of the motion as one under 28 U.S.C. 2255, that decision should bind the

parties at future stages of the post-conviction litigation unless the prisoner can demonstrate a valid excuse for his default. A person in custody under a final criminal judgment should be given one, and only one, opportunity to convince the district court, the court of appeals, and this Court that a post-conviction motion was improperly characterized as a motion under Section 2255.

The same rule should apply to the government. If a post-conviction motion is characterized as something *other than* a motion under 28 U.S.C. 2255, and the government does not challenge the characterization on appeal or cross-appeal of the district court's ruling on the motion, the parties should be bound by *that* characterization in subsequent stages of the post-conviction litigation. Cf. *Demarest* v. *Price*, 130 F.3d 922, 942 n.9 (10th Cir. 1997) (because, on appeal from district court's decision granting writ of habeas corpus, warden did not challenge determination that state prisoner received ineffective assistance counsel, that determination is law of the case in future proceedings).[11]

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[11] The en banc Sixth Circuit has stated, in dictum, that "it is not at all clear * * * that the law-of-the-case doctrine should apply to successive habeas [corpus] petitions," because "it [is] likely that each * * * petition is a separate and distinct case." *Rosales-Garcia* v. *Holland*, 322 F.3d 386, 398 n.11 (2003), petition for cert. pending, No. 02-1464. Unlike an application under 28 U.S.C. 2254, "a motion under § 2255 is a further step in the movant's criminal case and not a separate civil action." Rule 1 of the Rules Governing Section 2255 Proceedings for the United States District Courts, advisory comm. note (citing S. Rep. No. 1526, 80th Cong., 2d Sess. 2 (1948)). In any event, whether or not the law of the case doctrine strictly applies in post-conviction proceedings—and at least four courts of appeals have concluded that it does, see p. 28, *supra*—it is beyond dispute that principles of waiver and forfeiture do.

c. In support of his contention that his first post-conviction motion was improperly characterized, petitioner relies (Br. 20-21) on the Second Circuit's decision in *Adams* v. *United States*, 155 F.3d 582 (1998), and decisions from nine other circuits that follow either the rule established in *Adams* or some variation on it. See NACDL Br. 22 (citing cases). *Adams* held that a post-conviction motion may not be characterized as a Section 2255 motion unless (a) the prisoner, "with knowledge of the potential adverse consequences," agrees to have the motion so characterized or (b) the district court finds that the motion should be treated as one under 28 U.S.C. 2255 "because of the nature of the relief sought," and the court gives the prisoner an opportunity to withdraw the motion rather than having it so characterized. *Id.* at 584. Both *Adams* itself and five of the nine cases that follow it are consistent with the principles of law of the case and forfeiture outlined in this brief, because the prisoner in each of those cases challenged the characterization of his post-conviction motion in an appeal from the denial of that motion—not, as in this case, in an appeal from the dismissal of a subsequent motion. See *Morales* v. *United States*, 304 F.3d 764, 765 (8th Cir. 2002); *United States* v. *Emmanuel*, 288 F.3d 644, 646-647 (4th Cir. 2002); *United States* v. *Kelly*, 235 F.3d 1238, 1240-1241 (10th Cir. 2000); *United States* v. *Seesing*, 234 F.3d 456, 458-459 (9th Cir. 2000); *United States* v. *Miller*, 197 F.3d 644, 646-647 (3d Cir. 1999); *Adams*, 155 F.3d at 582-583.

While the other cases that follow *Adams* do involve a challenge to a characterization decision made at an earlier stage of the proceedings, see *United States* v. *Palmer*, 296 F.3d 1135, 1137-1140 (D.C. Cir. 2002); *In re Shelton*, 295 F.3d 620, 621 (6th Cir. 2002); *Henderson* v. *United States*, 264 F.3d 709, 710-711 (7th Cir. 2001);

Raineri v. *United States*, 233 F.3d 96, 98-99 (1st Cir. 2000), none explains why the prisoner was excused from the requirement that claims be raised at the earliest opportunity. The author of one of those decisions, moreover, has subsequently expressed doubt about the propriety of permitting an untimely challenge. In *Carter* v. *United States*, 312 F.3d 832 (7th Cir. 2002), an appeal from the denial of a post-conviction application treated as a motion under 28 U.S.C. 2255, Judge Posner described the Seventh Circuit's decision in *Henderson* as one that permitted "a belated appeal from the improper denial of [the prisoner's] first motion." 312 F.3d at 833. Judge Posner then acknowledged that "[i]t is clearer that [the prisoner] could have appealed from that first denial, an error potentially harmful to him, than that we should have allowed him to take in effect an untimely appeal from it." *Ibid.* The opinion goes on to say that "[u]ntimely appeals are not authorized," and that "decisions founded on a legal error are ordinarily treated as erroneous"—and therefore governed by principles of procedural default—"rather than void." *Ibid.*

3. Petitioner had an opportunity and incentive to challenge the district court's characterization of his first post-conviction motion on appeal

When a party fails to challenge a district court's decision on appeal, the decision may not be the law of the case in subsequent proceedings if the party did not have "an opportunity and an incentive to raise [the claim] * * * on appeal." *United States* v. *Quintieri*, 306 F.3d 1217, 1229 (2d Cir. 2002), cert. denied, No. 02-1191 (June 2, 2003). See also *United States* v. *Becerra*, 155 F.3d 740, 755 (5th Cir. 1998) (no exception to law of the case when party had "the means and incentive" to

raise claim in earlier appeal). Cf. Restatement (Second) of Judgments § 28(5)(c) (1982) (exception to issue preclusion when party sought to be precluded "did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action"). That exception does not apply here.

Petitioner certainly had an opportunity to challenge the district court's characterization of his first post-conviction motion. After the motion was denied, he filed an appeal in which he challenged the district court's denial of the motion and its refusal to hold an evidentiary hearing. There is no reason why he could not have challenged the characterization of the motion as well. See *Carter*, 312 F.3d at 833 (rejecting claim that appeal of characterization of first post-conviction motion was premature); *Kelly*, 235 F.3d at 1241 (same). See also *Seesing*, 234 F.3d at 458-464 (defendant raised, and court of appeals decided, four claims on appeal, including claim that district court had improperly characterized motion as one under 28 U.S.C. 2255).

In addition to having the opportunity, petitioner had an incentive to challenge the district court's characterization of his first post-conviction motion, because it substantially impaired his ability to file a subsequent motion under Section 2255. While the appeal from the denial of petitioner's first post-conviction motion predated the enactment of AEDPA, AEDPA was not a complete innovation in the law. As this Court has observed, AEDPA placed "further restrict[ions]" on the ability of prisoners to file a second or successive motion. *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996).

The version of Section 2255 in effect when petitioner filed his first post-conviction motion provided that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on

behalf of the same prisoner." 28 U.S.C. 2255 (1994). Under Rule 9(b) of the Rules Governing Section 2255 Proceedings, "[a] second or successive motion may be dismissed * * * if new and different grounds are alleged[] [and] the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules." At the time of petitioner's appeal, this Court had interpreted the doctrine of abuse of the writ to mean that a state prisoner could not assert new claims in a second or successive habeas corpus application unless he demonstrated either cause and prejudice or actual innocence. See *McCleskey*, 499 U.S. at 493-496. The effect of that holding, which had been extended to Section 2255 motions by the time of petitioner's first motion, see *United States* v. *Richards*, 5 F.3d 1369, 1370 (10th Cir. 1993); *United States* v. *Fallon*, 992 F.2d 212, 213 (8th Cir. 1993); *United States* v. *Flores*, 981 F.2d 231, 234-235 (5th Cir. 1993); *Andiarena* v. *United States*, 967 F.2d 715, 717 (1st Cir. 1992); *United States* v. *MacDonald*, 966 F.2d 854, 858 (4th Cir.), cert. denied, 506 U.S. 1002 (1992), was to create a presumption that a federal prisoner could not file a second or successive Section 2255 motion.

Petitioner therefore had every incentive to contest on appeal the district court's characterization of his first motion as a request for relief under Section 2255. Indeed, at the time of his second post-conviction motion, petitioner explicitly acknowledged, in his objections to the magistrate judge's recommendation, that characterizing his first motion as one under 28 U.S.C. 2255, "even pre-AEDPA, would have prevented [him] from filing a section 2255 [motion] presenting other claims known at the time." Pet. Pro Se Objections to Magistrate Judge's Report & Recommendation 1.

B. This Case Does Not Require The Court To Establish Standards For Deciding Whether A Post-Conviction Motion Has Been Properly Characterized As One Under 28 U.S.C. 2255

1. If the Court determines that 28 U.S.C. 2244(b)(3)(E) does not deprive it of jurisdiction, it can resolve this case on the ground that a district court's characterization of a first post-conviction motion as one under 28 U.S.C. 2255, unchallenged by the prisoner in his appeal from the denial of the motion, binds the parties when the prisoner files a subsequent post-conviction motion. That principle, however, will not be applicable in a variety of situations involving a challenge to the characterization of a post-conviction motion as one under Section 2255.

For example, law of the case will not apply when the prisoner has filed only one post-conviction motion and challenges the characterization of the motion in the appeal from the motion's denial. That is what happened in several of the cases on which petitioner relies. See *Morales*, 304 F.3d at 765; *Emmanuel*, 288 F.3d at 646-647; *Kelly*, 235 F.3d at 1240-1241; *Seesing*, 234 F.3d at 458-459; *Miller*, 197 F.3d at 646-647; *Adams*, 155 F.3d at 582-583. Law of the case will also be inapplicable when the prisoner has filed two post-conviction motions, it is the second motion that is recharacterized, and the prisoner challenges the recharacterization in an appeal from the dismissal of that motion as second or successive. That is what happened in *Abdur'Rahman* v. *Bell*, 123 S. Ct. 594 (2002), a Section 2254 case in which this Court granted certiorari and then dismissed the writ as improvidently granted. See *id.* at 594-596 (Stevens, J., dissenting). A third example of a case in which the characterization issue will not be resolved by law of the case principles is where the prisoner has filed

two post-conviction motions, the first one is characterized as a motion under Section 2255 when the second motion is filed, and the prisoner challenges the characterization of the first motion when the second motion is dismissed as second or successive. That is what happened in *Ruth* v. *United States*, 266 F.3d 658 (7th Cir. 2001). In each of these cases, the characterization decision was challenged at the earliest possible opportunity.

If the Court again grants certiorari in a case of the type just described, it will be necessary (assuming the Court has jurisdiction) to establish standards for determining when a post-conviction motion is to be treated as a motion under 28 U.S.C. 2255. Although it is not necessary to establish such standards in this case, the government submits that a motion should be treated as a Section 2255 motion at least under the following circumstances: (1) when the motion is denominated a Section 2255 motion and seeks relief available under Section 2255; (2) when the motion is not denominated a Section 2255 motion but seeks relief available only under Section 2255; and (3) when the motion is not denominated a Section 2255 motion and does not seek relief available only under Section 2255, but the prisoner has consented to its characterization as a Section 2255 motion. The standards would of course require elaboration and refinement in an appropriate case, but these are readily apparent circumstances in which a prisoner's post-conviction motion can appropriately be said to be one under 28 U.S.C. 2255.

2. *Adams* and the cases that follow it generally hold that a recharacterized post-conviction motion cannot be treated as a Section 2255 motion unless the prisoner was notified of the district court's intention to recharacterize the motion, warned of the consequences, and

given an opportunity to amend or withdraw the motion so that he may include all of his claims in a single motion. See *Morales*, 304 F.3d at 767; *Palmer*, 296 F.3d at 1146; *Shelton*, 295 F.3d at 622; *Emmanuel*, 288 F.3d at 646-647; *Henderson*, 264 F.3d at 710-711; *Kelly*, 235 F.3d at 1240-1241; *Seesing*, 234 F.3d at 458-459; *Raineri*, 233 F.3d at 100-101; *Miller*, 197 F.3d at 646-647; *Adams*, 155 F.3d at 582-583. The court of appeals in this case also adopted a rule of this type, albeit prospectively. See J.A. 203-206.

These notice requirements have no basis either in AEDPA or in the rules that govern Section 2255 proceedings. As Judge Posner observed in *Henderson*, "[t]here is no general equity escape hatch in the Antiterrorism and Effective Death Penalty Act * * * . Lack of full knowledge of the consequences of one's acts * * * is not a basis for waiving AEDPA's explicit requirements." 264 F.3d at 711. A prisoner who files a post-conviction motion that *is* denominated a Section 2255 motion is held accountable for the legal consequences, one of which is that the motion will likely be the only one he is permitted to file. The same accountability should attach when a prisoner's post-conviction motion is a Section 2255 motion in substance though not in name or when he agrees that his motion may be recharacterized as one under Section 2255. Under the pre-AEDPA abuse of the writ doctrine, recharacterization of a post-conviction motion also had the practical effect of preventing the prisoner from filing a second Section 2255 motion, yet courts had not engrafted a prerequisite of notice. The advent of AEDPA does not justify or necessitate such a change.

The approach adopted by a majority of the courts of appeals does have certain virtues, one of which is certainty. When a prisoner in those circuits has received

the required notice and either given his consent to recharacterization or refused to withdraw the motion, the post-conviction motion is a Section 2255 motion; when he has not, it is not. Such a rule is likely to reduce and simplify litigation over questions of characterization, which are often quite difficult. See, *e.g.*, *United States* v. *Evans*, 224 F.3d 670, 673-674 (7th Cir. 2000) (discussing when Rule 33 motion should be treated as Section 2255 motion). It may be appropriate, moreover, to view the notice requirements established by the courts of appeals as local rules of practice that the courts have the authority to adopt under Federal Rule of Appellate Procedure 47. In any event, this Court may well have the authority to establish a uniform notice requirement for the federal judiciary through the exercise of its supervisory powers. See, *e.g.*, *McNabb* v. *United States*, 318 U.S. 332, 340-341 (1943).

A decision on whether a notice requirement is appropriate, however, should await a case in which the district court's characterization decision was not established as the law of the case at an earlier stage of the post-conviction proceedings. This case should be decided on the ground that prisoners are bound by characterization decisions that have not been challenged at the earliest opportunity.

CONCLUSION

The writ of certiorari should be dismissed for lack of jurisdiction. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Paragraph 1 of 28 U.S.C. 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

2. Paragraph 8 of 28 U.S.C. 2255 provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

3. Subsection (a) of 28 U.S.C. 2254 provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

4. Subsection (b)(2) of 28 U.S.C. 2244 provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

5. Subsection (b)(3) of 28 U.S.C. 2244 provides:

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.